G. R. S. IX-5]

Previous references. 1838

Judicial

~~191~~

(Judicial Courts)

Later references.

File No. 1 A.

Serial Nos. Nil

GENERAL AND REVENUE SECRETARIAT.

(Enclosure to ~~Judl~~ Court File No 1 of 1838)

Serial Nos.

of Part B for

SUBJECT.

Re Authority of the Court of Judicature at Madras over Foreign States

W D 88—GPB—50,000—24-7-16

Memorandum.

The Judges of the Supreme Court take no notice of the Costs which suits completely both the Complainants and the Defendant. They never call for documents of the cause from their own Registrars Office when the said cause comes for trial.

This documents are furnished to the Judges by the Solicitors of both parties and the charges attending this mode are considerably heavy for a payment of one Rupee is charged for every 90 words.

Although when the Judges postpone to give their decision and to hear the arguments of the Barristers which is very common yet the Solicitors charge their clients a 25 Pagodas or Rupees 87½ for the Counsellor and in proportion for their (the Solicitors) attendance besides they charge large fee to study the merit of the cause and the Solicitor make copies of the cause and furnishes the same to the parties. these copies cost the parties much money for they are obliged to pay one Rupee for every 90 words.

Judges frequently refer the matters to the Masters and the Solicitors of both parties attend upon him and argue the matter agreeably to the order of the Court clients on such occasion undergo heavy charges at the

Masters

Master's Office, and find at last the Master's decision not conclusive which necessarily induce the parties to bring the matter again before the Judge a mode which is introduced no doubt to swell the Costs but if one of the Judges will undertake the tasks of the Masters not only a considerable saving will accrue to the parties but will also remove vexatious delay and inconvenience to which the parties are now subjected to.

The Registrar receiving fees for all papers of causes filed in and issued from his Office and for notes taken down by him, at the Bench and for reference of any papers at this Office, these fees alone is very enormous. He gets also fees to make in duplicate copies of papers of the cause filed by solicitors making altogether 3 sets a Rupee per folio the decree of the Court is only issued by him after he is paid for the copies. His income amounts to Rupees 7,000 per every year a sum much exceeds the salary of the Judge.

The Examiner in order to increase his charges swells up his examination and furnish one Copy to the solicitor and keep another at his Office. The Interpreters get also high fees to explain it to the Examiner.

The Regulations of these Offices are nothing but a source of heavy expense to the

parties.

Seales has nothing to do but to affix the seals on common notice for which simple duty a charge of one Rupee is made.

When a matter is referred to the Masters he invites both the Solicitors and their Clients to attend upon him and each notice costs 15 Rupees and the Solicitors of both parties are happy to prolong their proceedings at the Masters Office as in that case they can increase their costs a proceeding by which no one is safe for when the Court refers the matter to the Master the Solicitors begin fresh proceedings to file papers and all unnecessary documents for to their own advantage and Interest. The Master receives fees for copies of papers issued from his Office at 1 Rupee per Folio. Numerous meeting are seen to be held at the Masters Office and nothing done about the suit, but costs only increase, the Master gets nearly 50,000 Rupees per annum from the poor Individuals Money.

The Solicitors repeat their attendance on each common notice which costs about 7 Rupees and repeat their copies of the proceedings agreeable to their wish which also costs the parties much money.

These costs ruin every people in Madras their charge will appear clearly on reference

4

Reference to the Bill of Credits now sent for perusal
with the duties observations

Statement shewing the origin and progress of a Suit on the Equity side of the Supreme Court, which commenced in the year 1803 and is still pending - Davalgee Jeejy & Maneah Chetty.

When Mr. Wm. Balfour, Colonel Malcolm and Mr. Finnis cate held, under Government, the Contract for Military Clothing, Davalgee was employed by them as a Sub-Contractor; and he having them occasion for considerable funds to pay for Workmans Coolys, and for buttons and other materials for the Military Clothing, applied to P. Maury Chetty to supply him with funds from time to time for that purpose. The Military Agency ceased with the war of 1792, and in 1794, a settlement was made between them and a Bond then granted for the Amount of 10,870 Pagodas due to P. Maury Chitty with landed property valued by Davalgee at 13,000 Pagodas mortgaged to secure it.

Davalgee about one Year afterwards set off for Ramnad, where he remained for 7 Years. Previous to his departure P. Maury Chetty for motives of friendship and on the particular request of Davalgee, engaged to advance his family 40 Pagodas per Month, and from the rents and sales of some of Davalgee's property, to improve the remainder by the building of Godowns, bantigues &c.a - In the year, 1803 they came to a settlement. P. Maury Chitty rendered an account, in which he credited all the money he had received, and debited all he had paid, additional to the Bond for 10,870 Pagodas - That account shewed a balance of Pagodas 19,178.23.40 to be due to P. Maury Chitty; but as he had not calculated interest on his open account consisting of hundred of small Items, and the interest on which would not have exceeded 1430 Pagodas, he agreed to receive a new Bond for 15,000 Pagodas with a continuation of the mortgaged property, / thereby relinquishing

his

his claim to the difference between 4,178-25-40 and 1,430 Pagodas / and on receiving it, obtained also a declaration from Davajee of that final settlement having been made, and conveying to P. Maureah Chitty an authority, in case of non-payment of said Bond, to obtain Company's Grants for the mortgaged property in his own name.

Davajee in the year 1803, and soon after he had granted the bond for 15,000 Pagodas, and executed the said declaration, having fallen into distressed circumstances, pretended, in order to shew property to his creditors, that he had been cheated by P. Maury Chitty out of immense sums, altho' their transactions between them were confined to what has been stated in the preceding - P. Maureah Chitty had neglected to foreclose his mortgage, and Sau Dubashes then encouraged Davajee to apply to the Supreme Court for permission to file a Bill in Equity, in which he complained of fraud in his account and as every person made a Defendant in an Equity suit, is obliged to answer, P. Maury Chitty filed his answer with exhibits of the Mortgage Bonds, discharge &c. all the expensive process of an Equity suit was carried on until the year 1809 when Sir Thomas Strange then decreed, that as the account current of 1803. shewed irregularity in the mode of charging the interest. A new account should be made out by the Master commencing with the Bond for 16,870 Pagodas with a regular Interest-account on all receipts and disbursements from that period. but that the Master should not remove any of the Items in the P. Maury Chitty account Current between 1794 and 1803, but confine himself in making an interest account only, as it might be presumed all the vouchers &c. were cancelled on the settlement of 1803 and the Master was further desired to make the defendant P. Maury Chitty prove his disbursements subsequently to 1803, and then to calculate interest, and strike a balance, by which equitable mode of adjusting, the balance, would be on the 31st of January 1824 Pagodas 30,000 or Rupees 1,05,000.

This order was sufficiently equitable and clear, and if an

account-

account had been so made up, would have shewn, as has been above stated, a balance due to P. Maury Chitty greatly exceeding the value of the mortgaged property. The Master Doctor Lebb delayed his report, until the year 1818, when he rendered to the Court an Account, in which he credited P. Maury Chitty with the Bond for 15,000 Pagodas, but debited him not only with interest on all sums received by P. Maury Chetty between the year 1794 and 1803, but also with the principal, thereby giving Davalgee twice credited for the same thing, since they were credited in the adjusted account of 1803 and thereby raised a balance to be due by P. Maury Chitty of Pagodas 13,096-24-14 on the 10th September 1818.

P. Maury Chitty died in the year 1814, but the suit was revived against his Sons as his representatives. The expensive process of filing exceptions to the Masters report proceeded until it was discovered in Sir Thomas Strange's printed Reports that his Report on the case of Davalgee against P. Mauveah Chetty differed essentially from the recorded decree. On calling for the original decree, the Register reported that it was not amongst his records. although no other decrees were missing. The Solicitor for the Complainant Davalgee, was the Register of the Court at the time that decree was made. The difference between the Report and the decree was, in respect to the date of the Bond, that of 1803 having been substituted for 1794 and the decree was so framed that the Masters report was in a great degree in conformity to it. The time having elapsed for applying for a new trial, and the Judges not having the power of altering a decree, the representatives of P. Maury Chitty were placed in a very distressing situation by that false decree and that Report of the Master.

After repeated arguments on the exceptions to the Masters Report, the Court ordered in 1823, that an account should be taken by the Masters,

in

in which the Defendant P. Maury Chitty should be credited with the Bond for 15,000 Pagodas and interest and with the difference between said Pagodas 19,178-23-46. and 15,000 Pagodas and be debited with any balance of Interest which might be due on the open account closed in 1803; and that he should be made to prove all his disbursements, even those between 1794 and 1803, but with every fair allowance for lapse of time and the various circumstances which attach to the case.

The Master the Mr Byrne allowed only the Defendant P. Maury Chitty credit for Pagodas 3324-27-30 out of Pagodas 8789-43-50 the amount of disbursements admitted in the settled account of 1803, and on Davaljees declaration, and yet the Master reports a balance to be due to the representatives of P. Maury Chitty at 30th January 1824 of Pags 8027-12-43. It may also be remarked that the said sum of Pags 5464-16-20 of dis-bursements was disallowed by the Master, altho' it was proved by the complaints cross answer that the Cadjans account, which are numbered like the pages of a book, produced by the complainant, to prove the receipts of P. Maury Chitty, had been fraudulently mutilated for all the leaves proving the disbursements of P. Maury Chitty were stolen or abstracted.

Davaljee died about seven years ago when his reputed illegitimate daughter obtained letter of administration to his Estate, and at some time was admitted as a pauper by the Court to carry on the Suit, and as she recently died, it is now dormant. Previous to the death of the administratrix, her solicitor had however filed five exceptions to the Masters report for argument. In that state the suit will probably remain until the arrival of New Judges, who before giving a decree, will have to peruse a Cooly load of Bills Answers, Cross Bills, and answers, depositions exceptions, exhibits Vols Vols Vols so that it is impossible to conjecture what the law expences of this suit may yet cost. The Bills of Cost already paid in defending this pauper suit amounts to Rs 35,000, a payment also which could not be delayed, or evaded, for the process for the recovery of an Attorneys Bill is sufficiently summary, since attachment and imprisonment

imprisonment may almost instantly follow a demand for payment.

Copy 8

To

C. T. Metcalfe Esq.re C.

Secretary to Government

Political Department

Sir,

I have the Honor to acknowledge the receipt of your dated 24th ultimo requesting my opinion the question "How can the Court of Judicature at Madras legally exercise Authority in the Dominions of a Foreign independent Sovereign such as the Nizam of Hyderabad."-

2. Perhaps the most satisfactory mode of answering this difficult and important question is to refer to what has been discussed and decided ~~upon the~~ subject.-

3. I find from a case in Sir Thomas Strange's Reports of cases adjudged in the Supreme Court of Judicature at Madras. Vol 2. p 372 that that Court so late as 1816 was unanimously of opinion after full consideration that they have legal authority to execute both Civil and Criminal process in the Territories of a Foreign State similar to that of the Nizam. I presume the question is meant to be limited to the exercise of authority in respect to a British subject or a person in some way subject to the Ordinary Jurisdiction of the Court and through the medium of process. It never could be maintained that authority

could

could legally be exercised generally or in the case of persons in no way subject to its Jurisdiction.—

4 The case in which the point came in discussion at Madras was a Bill in Equity to which the East India Company and Colonel Munro were Defendants. Colonel Munro was at the time residing in Travancore as Resident and he pleaded to the Jurisdiction. The question was whether Colonel Munro (who was official Resident) and who was at the time of commencing the suit in the Dominions of Her Highness the Ranee of Travancore was liable to be sued in the Supreme Court at least till his return within its ordinary limits of Jurisdiction.—

5 It was not denied in that case that Criminal Process might issue against a British Subject in such Circumstances conformably to the Words of the Madras Charter which leave no doubt on the subject They are as follows—

Printed Charter P. 33

And we do further authorize and empower the said Supreme Court of Judicature at Madras in like manner to enquire &c^a of all Murders &c^a misdemeanours wrongs and oppressions had done or committed within &c^a or within any of the Dominions of the Native Princes of India in alliance with the said Government and for that purpose to award and issue a Writ or Writs to the said Sheriff prepared in manner before mentioned Commanding him to arrest and seize the Body or Bodies of such Offender or Offenders and him or them to bring to Fort St George aforesaid &c^a &c^a—

There

There can be no difference of opinion in this case upon the general principles that would apply to the question in ordinary circumstances. It is impossible according to the law of Nations that any Court of Justice should of its own right exercise any authority in the Dominions of a foreign independant Prince or State. The principal question however is not whether such exercise of authority might not afford ground of complaint to the foreign independant State, but whether it may not be legal and warrantable according to laws of the Country, under which the Court exercising the authority is acting. In this case if there be any violation of the independance of a foreign Prince it is warranted by His Majesty's Charter.

7 It appears to me indeed that in criminal cases especially the Supreme Government is warranted by the words of the Act of Parliament 37 Geo. 3, C 142 and 40 Geo. 3 C. 79 and the Charter passed pursuant thereto part of which last has been cited, the 37 Geo. 3. C enacts that the Court to be erected shall have power to hear and determine all Manner of Complaints against any of His Majesty's Subjects for any Crimes misdemeanours or oppressions and also to hear and determine all Suits and Actions whatsoever against any of His Majesty's Subjects arising in Territories subject to or dependant upon the said Government of Madras and Bombay

Bombay respectively or within any of the Dominions of the Native Princes of India in alliance with the said Government respectively.—

8 This combined with the terms of the Charter creates a very singular and anomalous species of Jurisdiction By the acts and Charter which as to civil Jurisdiction is rather more extensive than that of the Supreme Court here / British subjects committing offences in the Territories of a Native allied Prince are made personally amenable to the ordinary Jurisdiction of the Court and no distinction is made whether the Offence is committed in the British Territories or those of a Native Prince. The Court at Madras held that the Jurisdiction being given "the right of issuing Writs and making orders virtually and necessarily follows." Whether that be a just conclusion it is not necessary to consider; as under the Madras Charter the Authority to issue Writs against Criminal Offenders, being in the Territories of Native Princes, is expressly given.—

9. It appears to me therefore that subject to the displeasure of the Native Princes and the difficulties

of executing the Writ in case of resistance / Criminal process might lawfully be executed, and therefore authority lawfully exercised by the Supreme Court and that the person being a British Subject against whom such process was issued could not legally resist and would be liable to all the Consequences of resisting lawful Process any where else.-

10 The objection of the danger of the Writ being disobeyed was urged in the case at Madras and the Answer given by the Court was twofold "Disobedience to the Kings Writ by one of his proper subjects in India is never to be supposed, another and more decisive answer is, that "what the Court "might not in such a case be able to do for itself "the local Government would readily do for it. Upon a "suitable application by the Court it would at once call "down to the Presidency a British Subject presuming "to withstand the Kings Writ." The danger of actual resistance may indeed exist in every case, and it is only from the certainty that the public force will second the legal Officer that he is not resisted in any instance.

11. If the Writ be lawfully issued the refusal of necessary aid proportioned to the exigency of the case would be subject of legal animadversion for the Letters Patent in the most pointed terms enjoin all constituted authorities Civil and Military that in the execution of the several

power

powers" Jurisdiction and Authorities thereby created they be aiding, assisting and obedient in all things &c.

12. That acts in themselves inconsistent with international law must if done by legal British authority be held lawful notwithstanding the Breach of the independance of a Foreign State was decided, also in a very important case many Years ago, and it appears to me to afford considerable illustration of the principles on which the present question is to be determined.—

It is the case of Nichol and Verelst formerly Governor of Fort William for causing Nichol to be seized in a very violent Manner, indeed by an Armed Force, at Allahbad in the Dominions of an independent State where he resided with the Approbation of the Prince and brought down to Calcutta and sent Home. Governor Verelst justified under the Company's Charters which give Power to seize British subjects residing without authority within the limits of the Company's Charter. The reply was that the Pl^t was guilty of no offence by residing and trading in the Territory of an independent Prince, and that he was not liable to be seized; and that at all events the Company had no right to seize him in the Territory of an Independent Prince. Lord Chief Justice de Grey on the second question said "The grant (to the "Company) is to exercise those Powers within their "limits generally, that is so far as and when they "can. This may be done either by leave of the

Country

Country powers or by negativing their displeasure. Many
"Acts of Jurisdiction as Commissions to examine Witnesses
"&c are every day executed in Foreign Parts either by per-
"-mission or clandestinely. But in either case they are
"valid here at home and so considered by our Courts. —

14 So in the present case a British subject
who is expressly amenable for Offences committed in the
Territory of a Native Prince is liable to be arrested in that
Territory; and indeed the Company violently asserting
their rights as in the case of Nichol and Verelst is not
so favorable an instance as that process executed against
a person subject to the Jurisdiction of that Court, and
shows more strongly that there are cases in which au-
-thority may in a certain sense be legally exercised by
another State in the Dominions of an Independent Prince
As against a British subject so situated there is a
personal Jurisdiction constituted independently of
locality. The British subject could not complain
of the execution of such process whatever right the
Sovereign might have to be displeased. —

15. This distinguishes the case from that of an
arrest in a Foreign Country by an Officer of Justice under
the most extensive Warrant that could be issued by a
British Court at home, such arrest would be founded
in no Authority conferred by British Laws. In this case the
Power extraordinary as it seems is conferred by legal constitutional
authority, and a British subject is not at liberty to dispute its

Validity.

Validity.—

16. It appears to me that the Acts and Charters by creating a Jurisdiction both Civil and Criminal in respect of the person have to a certain degree considered British subjects as substantially not amenable to the ordinary Jurisdiction of the Sovereign, on whose territory they reside, but as directly and ordinarily amenable to its own Courts. Perhaps these provisions imply a disregard or distrust of the actual independence of such states.— Whether necessarily or unnecessarily I will not determine, there is little doubt that the extensive powers given in such cases were meant to secure redress for wrongs which were thought not likely to be redressed except in the Kings Court. Any objection by the Native Princes never was anticipated. It seems therefore that the Nature of the Jurisdiction implies the necessity of the power to issue process directly against a British subject for Offences committed in the Territory of a Native Prince, perhaps without the express power contained in the Madras Charter. The Charter of the Supreme Court here had no such clause because at the time it was granted the Act of 24 Geo. 3. C. 25. and the 33 Geo. C. 52. 1793 extending the Jurisdiction had not then passed. The power of the Supreme Court here therefore would stand on general principles. That of the Court at Madras stands on express authority.—

17. It is possible that the Nizam might resent the exercise of the Authority given by British Laws to

to the Supreme Court at Madras, and as an independent Prince he might punish the persons acting under the Writs of that Court, though in the situation in which that Prince really stands in relation to the British Government such resistance is not very probable -

18. It seems very necessary however that some regulation should be adopted for the execution of process and for the arrest of Offenders with the authority of the Native Prince (a matter frequently provided for by treaty) and with as much attention as possible to the feelings of the Sovereign whose independance seems to be invaded, perhaps therefore it might be done after due notification to the Nizam and with his concurrence on application through the British Resident on the spot -

19. Some aware that in the particular case which suggested the present question the exercise of authority was different from that of the ordinary issuing of criminal process. It appears to me however, that as the Writ of Habeas Corpus is founded on the allegation of an illegal imprisonment or detention and consequently an act of oppression it might be issued by the Court at Madras to a British subject for the protections of Natives whether the subjects of the Sovereign in whose Territories the British subject happens to be or not. Very great caution must be required in considering such applications, which might be abused; and in all cases the issuing such a Writ must be attended with considerable inconvenience - If I do not mistake however the Madras Government by an Official communication to Colonel Coles prepared him to obey the Writ, I have already mentioned that various important questions were involved

in

in the issuing of the Writ of Habeas Corpus which might have been discussed and among others the question how far the parties applying for it had a right to such writ and also the propriety, on the return of the Writ, of remanding the Prisoners to their former custody; and I cannot conceive that the Writ could be issued or the Prisoners discharged till the Court had pronounced on the regularity of the application and the legality of the Confinement. I am not informed of the grounds of the application which might be such prima facie as to justify issuing the Writ, though fabricated and untrue in fact -

I have &c &c &c

(Signed) R. Spankie
Advocate General

Fort William
5th May 1819

A true copy
(Signed) C.T. Metcalfe
Secy to the Govt

A true copy
(Signed) G.G. Bolroyd. Sr Bart
Resident Cocanada

As by the terms of the Charter the Jurisdiction of the Supreme Court extends to the hearing and determining of all suits and actions whatsoever against any British subject within any of the Dominions of the native princes of India in alliance with the Government, it seems to me a natural consequence, that a British subject within any of such dominions is liable to the process in question, and that the Jurisdiction of the Court must be considered as extending to all British subjects so resident, with reference to all matters incidental to the hearing, and determining of such suits, and actions; and that it would be a singular construction of the Charter to hold, that a British subject so resident should be liable to a suit, or action in the Supreme Court, and yet that a British subject living next door to him being a material Witness in his defence, could not be compelled by the process of the same Court to attend there to give his Evidence In short, I think, that the Charter confers on the Court a Jurisdiction over all British subjects so resident for all the purposes of Civil, & Criminal Jurisdiction.-

Such is my opinion on the General point, but, I observe, that in the present case the subpæna is so framed as not to extend to Mr Rupsl, for it is a direction to the Sheriff to summon him "if he may be found in Madras, or in any of the Factories or Territories subject to, or dependant on the Government" "Omitting the words in the Charter" or within any of the

the dominions of the Native princes." Therefore, the Subpæna is not applicable to him.-

The service of it also was irregular in not being conformable to the Course prescribed pag: 16 of the Charter, which was particularly requisite in a Case circumstanced like the present: and therefore, I apprehend, that Mr. Russel is not bound to take any notice of it. But if the Plaintiffs, should without regard to the important functions Mr. Russel has to discharge, and the public inconvenience which is likely to result from his absence from his station, shall be so obstinate as to refuse to take Mr Russel's evidence by commission, and should amend the process, and procure it to be served in the mode prescribed in the Charter, I do not see how Mr. Russel can legally resist it. But on the Plaintiffs making the proper application to the Court for a Subpæna in pursuance of the Charter, to which I have above alluded, there will be an opportunity of taking the sentiments of the Court upon the circumstances of this Case.-

/Signed/ Samuel Toller

Dat. St. George Jany 27th 1813.

Jurisdiction of Supreme Court over burgesses - proceeding in matter of Fort

Copy

No. 13.

Extract from the Proceedings of the Right Honble the Governor General of India in Council, in the Legislative Department, under date the 13th July 1840.

Opinion of the Offg. Advocate General

I am of opinion that the process of the Supreme Court of Madras, cannot legally be executed within the Territories of His Highness the Rajah of Mysore, nor within any Territories whatever, where the Sovereignty of the Country is admitted to be vested in other than the East India Company, and that the Sheriff of Madras in attempting to execute such process, is a Trespasser / to use an expression, which perhaps is more applicable to the illegal exercise of unauthorized acts, in our own than in a foreign Country / and

in

in no degree protected by the process —
which he seeks to execute —

2nd " In no one way does this —
assumption of power by the Madras Court,
appear to me to be justified by the terms
of the Charter establishing the Court —
nor if the Charter in terms authorized
it should I consider that that power
could be exercised without a violation
of all the principles of international
law. — If it were directed to be ex-
-ercised by an Act of the British Le-
gislature, although it would be binding
upon British subjects, and it would
be an offence in them to oppose the
execution of such act, it would not
be less a violation of such principles,
unless passed in pursuance of a Treaty
entered into between the British Go-
vernment, and the Government of
that Country where such power was
to be exercised. — The British Parliament

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can make no Laws binding upon the subjects of a foreign power and can legalize no acts in a foreign country, not legal, or authorized there, committed contrary to the will of the governing power in such foreign country, although an act of the British Legislature may make the Commission by any British subjects within such foreign Territories illegal and punishable if he should become amenable to a British Court of Justice— But as the British Government or Legislature is incapable of erecting Courts in a foreign Sovereignty without the assent of the Sovereign power of such Country, so it is incapable of directing the execution of any description of Judicial power or process within such Country unless with the direct assent of the ruling power there.—

3rd 11 2nd I am aware that it may be said that Mysore is virtually governed by the East India Company; but I believe, however true that may be, the Sovereignty of Mysore is still expressly admitted to be in the Rajah, and the authority of the Government there is exercised in his Name and on his behalf (nominally) by the East India Company as Trustees for him, and that the Sovereignty might be instantly surrendered into his hands to be exercised by him, without any change whatsoever, beyond that of the persons who exercise the powers of Government. That the Sovereignty is exercised by the East India Company, as Trustees for the Rajah does not appear to me to affect the principle which governs this case. As Trustees for the Rajah it is contrary to their duty to commit, or to allow in others, any violation of the

the Sovereignty which might disable them from restoring it to the person whose Sovereignty they admit without any derogation.—

4. Even however should these principles be considered inapplicable (which I apprehend they cannot be) still the Madras Charter appears to exclude all idea of the right of that Court to exercise the powers which they claim - The Letters patent of the 26th December 1800, establishing the Court under the authority of the 40th Geo III Ch. 79 recite from the act the expediency of erecting a Supreme Court at Madras "in the "same form and with the same "powers and authorities" as that of Calcutta and to exercise such jurisdiction both as to Natives and British Subjects and to be

invested

invested with such power for the better administration of the same, and subject to the same limitations &c. within Madras and the limits thereof and the Factories subordinate thereto, and within the Territories which then were or thereafter might be subject to or dependent upon the said Government of Madras." As the Court of Calcutta is invested with within Fort William &c. The Charter then proceeds to erect the Court, and by Section 21 to define its jurisdiction which it declares "shall extend to all" British subjects who shall reside "within any of the Factories, subject to or dependent "upon the Government of Madras, and "that the said Court shall be competent "and effectual, and shall have full "power and authority to hear and deter- "mine all suits and actions whatsoever against any of our said subjects arising

in

"in Territories subject to, or dependent
"upon the said Government, or within
"any of the dominions of the Native
"Princes of India, in alliances with
"the said Government, or against any
"person or persons who at the time
"when the cause of action shall have
"arisen, shall have been employed by,
"or shall have been directly or indi-
"rectly in the service of the said United
"Company, or any of the said subjects
"of us, our Heirs or Successors."

5. To give a jurisdiction over British subjects, or Servants of the Company, to try actions against them for acts done in the Territories of a foreign Prince by no means gives the power to the Court to issue process into the Territories of such foreign Prince - If it did, it would equally authorize the Court at Madras, to

issue

issue Writs not only to Mysore,
Nagpoor, and Hyderabad, as now claimed,
but to China, Affghanistan, Persia,
and Lahore where there are persons
in the Service of the Company over
all of whom the Court have juris-
=diction expressly given in the Clause
I have copied -

6. I imagine that the claim
of jurisdiction now made by the Madras
Court is maintained, if not built upon
the Case of Hanuckoo Vencatesspar. Jan-
=nardanay Roy, 1 Ves. The Company and
Munro, 2 Sir T. Strange's Madras -
Cases 199, admitting that Case to be
Law I do not consider it would support
the Claim for reasons which I shall
assign presently - But I have no hesi-
=tation in saying with every deference
for the Learned Judges who decided
it, that I do not consider that that
Case is Law, or that the principles

upon

upon which the decision is rested, would be recognized or admitted in the Privy Council.- It certainly goes too far- It claims too much- The same principle which would admit the reasoning in that case (page 306) upon which the jurisdiction is claimed for the Courts of Travancore, Mysore, of the Nizam's, and the Peishwa, would equally apply to those of Affghanistan, China, — Persia, or Lahore, as I have mentioned- nor is anything stated to shew whether this is contended to be an exclusive jurisdiction in the Madras Courts or a concurrent one with that of Calcutta- If the former it is extraordinary when the object of the Act and of the Charter was to authorize the erection of a similar jurisdiction to that of Calcutta, that it should have given (without here questioning the power of the Crown under the circumstances

to

to give) a more extensive one - If a con-
=current jurisdiction then, if the grant
of jurisdiction to the Madras Court draws
to it the power to send its Sheriff to
execute its process in a Foreign Terri-
tory, of course the Calcutta Court for the
like reason, must have the like power —

Both Sheriffs may have to seize one
defendant for two Debts, or two causes
of action - which shall prevail ? There
is no mode pointed out, by which this
Clashing Jurisdiction of two foreign
Courts shall be exercised in the Territo-
ries of the Allied Sovereign. —

7. The reasoning as to the Crimin-
al Jurisdiction (page 208) in which
a writ is in express Terms given, being
in pari Materia with the Civil juris-
diction, and therefore to receive a Sim-
ilar construction seems to me equally
untenable - where no words are expres-
sive there is no room for "Constructions

and

and tho' the chief justice goes on to observe that "why a writ was given in the one case and not in the other, is a matter of conjecture, he goes on to suggest a reason which shews that the two parts of the Charter are not in pari materia - and that the strongest reason prevails why the writ, this — expressly given in one case, was not given in the other, - namely "on account "of the greater importance of the subject, "the consequence of crime being penal "and injury contradistinctioned from crime, remedial only" - He might have gone on to add that powers in friend- "ship and alliance" are accustomed internationally to give up (dependent in some degree on the nature of the crimes) criminals, and consequently in India, Native Princes "in alliance with the Madras Government" were not likely to object to this authority -

and that

whilst no such usage prevails, as to persons charged with mere debts or subject to Civil actions, and consequently the "writ given in the one case" might not be given in the other" and this as far as authorizing such writ to be issued (under treaty of there were one) would have been a good one, but in lieu of this he proceeds to state that "there was no occasion to give the writ "in either case, because if the jurisdiction "to sue or prosecute is given, the "rights of issuing writs, and of making "orders virtually and necessarily follows"

If this be Law, it follows, that under the 24th Geo III C 25 & 44 Every Court competent to try offences committed in India, by British subjects is competent to direct and issue a writ into the Territories of any Native Prince, or State in India. and that

under

under the statute 26 Geo. III C 57 s 29 - all Her Majesty's courts of Criminal jurisdiction have power to issue writs "in any of the countries "or parts of Asia, Africa, or America, "beyond the Cape of Good Hope, to the "Straits of Magellan within the limits "of the exclusive Trade," against any of Her Majesty's subjects, for offences committed against any of such subjects, or <u>any other person</u> and that as a Court may be constituted at Home under 9 Geo IV C 31 (repeating the former acts) for the trial of Murder or Manslaughter committed by any British subject abroad (Paris for instance) such Court has a "right virtually and necessarily" incident to the jurisdiction to prosecute" to issue process of arrest against the accused - subpoenas to witnesses &c into such foreign country - into France or Austria, to

Paris

Paris to Vienna - It is not very likely that the Special officer of the Court would be allowed to exercise this right, unmolested by the Prefect of Police in Paris - If an offence cognizable in the French Courts (such as Treason against France) by the Laws of France, were committed by a Frenchman in England, it would be impossible to contend that England would permit such a Frenchman to be taken under a French Process in London - He would be liberated instantly by Habeas Corpus - No Lawyer could, or would, on Consideration maintain that "if a jurisdiction to sue or prosecute "is given the right of issuing writs, and "making orders virtually and necessarily "follows" - This would be to give every English Court in Transitory actions or Suits a right to issue writs against British Subjects in every quarter of the Globe - It would be quite unnecessary

to

to state against a Defendant in a suit of Equity in England "that he was absent in France" or elsewhere, "out of the jurisdiction and beyond the process of the Court of Chancery— The Lord Chancellor would say if this were Law / I have jurisdiction over the subject matter - Therefore I have a right to issue process against the party, and will give you a process against him, whether he is in Paris, Constantinople, or Vienna—

8 The remainder of the Chief Justice's argument seems equally open to objection - He observes that without that Clause in the Charter the Court would have had the same jurisdiction, as the cause of suit was transitory, without the Clause in the Charter, and therefore that, according to the argument made, that clause would be idle and useless giving the Court only

only an authority which they had without it. That is not so, for though in the particular cause before the Court they would have had the jurisdiction without it, yet there are a number of actions which are local in their nature which could not be tried in the Court at Madras without that Clause, and the object of the Charter was to give a complete jurisdiction to the Court in all actions, whether Transitory or Local, against British Subjects who might be capable of being in any way brought before the Court, but certainly not to violate the rights of any Native Princes in whose Sovereignty whether in outward appearance and in name only, or in reality and substantially might be admitted and recognized.—

9. There are however a variety of other objections to this decision as

it

it appears to me, which as this opinion has already run to a much greater length than I intended I shall endeavour in some degree to compress.

10. By section 27 of the Charter, a provision is made for the case of a party subject to the jurisdiction of the Court not being to be found within it. The process directed is by Sequestration. It may be urged he may not have property to sequester. So that the obvious answer is that as in cases in England or in India where a party leaves the jurisdiction, either by going to Sea or elsewhere, there is a partial, or perhaps a mere temporary failure of jurisdiction which in the case of Colonel Munro might have been obviated by the very course suggested at P. 209 to meet the case of a person "presuming to withstand" not the "Kings writ") but an appeal on the

part

part of a Native Foreigner to a British
Court of Competent jurisdiction for an
alleged just claim against a British
Subject- But another answer is that
if the right to issue one process into a
foreign Country be established this
right to issue another must be equally
so- Under the Sequestration clause (24)
"not to be found" within the jurisdiction"
must mean, according to the argument
of the Madras bar, not the limits of
Madras or the Madras Presidency and
its dependencies but besides, that, the
Sheriff (or the Special Sheriff) has
searched all the dominions of the Native
Princes, in alliance with the Govern-
ment of Madras, and the whole of the
Territories of the Rajah of Mysore or
the Nizam, or Oude, or Lahore or
Persia, or Affghanistan according to
the place where the British Subject
may be residing- This certainly would

be

be a most spacious Bailiwick - But if the Case relied on is worth any thing it must go to the absurd extent, that if when Sir John Malcolm was attached to the Residency at Hyderabad, he had entered into a Contract for the purchase of a Horse, or had beaten a Native Lyce, or had an account with a Dowcar, the Court at Madras could afterwards have issued a writ against him, and arrested him in Persia in returning from his embassy, and taken him to Madras to answer this Complaint and this is to be justified because he may have "perhaps no intention of ever returning to Madras" This is certainly an extreme Case - but the principles laid down in the Case of Colonel Munro, if they are worth any thing, extend to the point that the Court may do this - and if they may, they must

must do this, if required on affidavits in the usual manner - If they could issue a writ to compel the Resident at Travancore to answer a Bill - I presume they could issue one to arrest him and if this argument is good, they could also arrest the Envoy to Persia at Tehran as soon as his embassy was concluded or perhaps they could day before. -

11. I think besides the objection to the argument as to the writ in Criminal Cases which I have before noticed there is another - namely that that clause is given only by the Charter and exceeds the authority given by the act authorizing the erection of the Court - The King could make no Law to bind foreign countries to be valid in the Territories of Native Princes in alliance with the Madras Government without their assent. If

If a part of the Prerogative of the Crown to erect and create Courts and grant jurisdiction in the British dominions it extends no further, and I am consequently of opinion that that Clause in the Charter is void as exceeding the authority of the Crown - I admit that the Charter giving jurisdiction over British Subjects does not "interpose as a Condition of their immediate responsibility that they should be resident in any particular part of British India" - See 2. Sir T. Strange 207. It was unnecessary - The Court could not issue writs beyond the Limits for which they were appointed - Those Limits are defined by the Act, and in my opinion extend only to "Fort Saint George and Town of Madras and the Limits thereof and the Factories subordinate thereto, and within

the

the Territories" which at the time of the "passing of the Statute 40 Geo. III Ch. 79 "or which thereafter may have become "subject to or dependent upon the said "Government of Madras"-

12. A further objection to the exercise of the right claimed, is that neither the Territories of Nagpore, Mysore, Hyderabad &c. are "dependent upon or in alliance with the Government of Madras"- So the Territories only of such Native Princes as are in alliance with that Government is the jurisdiction of the Madras Court confined.-

13. So the case I have mentioned there is a further objection as any authority- I hardly know how the objection could have been raised by plea.- There must have been a previous writ. That as far as the Company was concerned of Course was in the usual form

form and probably the Company's attorney appeared for Colonel Munro also. But if the writ was not properly served, that would appear more properly the subject of motion than of plea. Colonel Munro was beyond doubt subject to the jurisdiction if duly brought before the Courts and how brought nowhere appears. a voluntary appearance would waive the objection to the service—

14. I have caused search to be made in the offices of the Supreme Court through the Company's attorney whether any writ has ever been issued by the Supreme Court hereinto any foreign State, into the State of any Native Prince, in alliance with the East India Company, and have been unable to find that a single writ of any description has been so issued

nor

nor can I learn after much enquiry that any Sheriff has ever been called upon to execute such, I have no doubt therefore that none have been issued. There is in Calcutta a constant commercial intercourse not only with Lucknow, Nagpore and Hyderabad, but with all the smaller independent States and yet it never has been considered that the Court had power to issue into those Territories a writ against any one Native or European Resident there. The many Native Inhabitants of those places have been sued in the Supreme Court, it has always been as Inhabitants of Calcutta from having places of business and an Establishment of Servants and carrying on Trade (chiefly as Bankers) in Calcutta and tho I know of many British subjects residing in Lucknow who owed large sums of

of money, their creditors have never been able to sue them in the Supreme Court. The only Case which I have been able to discover, in which the matter has in any degree undergone judicial decision here is a Case of Mehndy Ally Khan Vs Morton, in which the question arose incidentally in 1826. The defendant was arrested at Cawnpore and brought down the River under the Guard:- They landed for a short time on a Char in the middle of the River, and there the Defendant was rescued and made his escape into Oude and could not be retaken - The Sheriffs Officer not Considering himself justified in following him. A motion was made for an attachment and a Rule granted but on cause being shewn, it appearing that that part of the Char was (or it being at least doubtful whether it was not) in the Oude Territories, the Supreme Court discharged

discharged the Rule for the attachment as they considered it not to be shewn — clearly that the rescue took place within the jurisdiction of the Court. — The Defend- -ant was never taken again, but escaped to Serampore to be nearer Calcutta, and was on the application of this Govern- -ment delivered up by the Danish Gov- -ernment (on certain terms) to be tried on an ex-officio information, but not filed on behalf of the Company for a Cons- -piracy — He was tried, and acquitted. —

15 This is the only case in which the question of the Jurisdiction of this Court extending into any of the Native States so as to authorize their issuing writs there, has ever even incidentally arison in the Supreme Court at Calcutta — and there never has been any idea that a writ so executed was of any avail among the practitioners or Judges of the Court since I first came into the

country

country now upwards of 17 Years.

16- It now only remains for me to state the course which I should recommend the Government to pursue.

17 Where two authorities who derive their right of acting from the same source come into collision. I never should decide that the stronger power should interfere by force to prevent the exercise of the right claimed by the weaker - such interference is unseemly - to say the least of it - and the proper course is to appeal to the source from whence each derive its authority to decide the matter which gives rise to the difference, but where the one authority is / at least nominally and outwardly / derived from a separate Sovereign power from the other, it seems to me essential, to the maintenance of that Sovereignty that the opposite power should

should be prevented from the exercise
of any right claimed in opposition
to its Supremacy in its own Limits —
until the matter should be definitively
settled by Competent authority - That
remonstrance should be used in the
first instance, and if not attended to,
that such remonstrance shall be
supported by the exercise of force —
If therefore after such remonstrance
shall have been made to the Court
at Madras, against their issuing any
writs to be executed beyond the Limits
I have mentioned, they should continue
to issue them, I should advise instruc-
tions being given to the Residents at
the different Courts of the Native Prin-
-ces to cause the Sheriff and all persons
acting under such writs to be treated
as trespasses in the exercise of an —
illegal Acts as seems to have been
done already in Mysore —

I

18. I beg I may be distinctly understood as recommending that this Course should be pursued only out of the Limits of the Company in the Madras Territories, but I should on no account recommend such a Course to be pursued upon any difference of opinion which might arise as to the due exercise of the jurisdiction of the Court, within the Territories subject to, or dependent upon the Government of Madras.—

19. It may also be as well to observe that I do not mean to give any opinion as to the right of the Madras Court to substitute any other description of Service for personal Service of a writ upon any person resident beyond the Limits I have spoken of "in Territories of Native Princes in alliance with the Madras Government" so as to bring such parties before the Court

Court — My opinion is confined to the right to issue Writs into such Territories. —

Nothing is stated as to what has been done in the Case appealed in 1836. referred to in the Letter of the Advocate General of Madras, of the 4th October 1839 with the whole of his opinions as expressed in that Letter I entirely concur, and whilst I have recommended such Course as about to be pursued for the future I should also recommend the present Case being referred to the Court of Directors for them to institute another appeal against the late decision of the Judges upon the part as well of the Company on the ground of the claim of the Judicature if so advised at Home, as also on behalf of the Advocate General of Madras, who has a clear right of Appeal I conceive against an order made upon him

him personally to pay Costs on a motion on behalf of the Company.—

20. Whether strictly the Company had a right to make the motion which he made, not being directly concerned in the Cause, may be a matter of doubt and perhaps the motion should have been made in the name of the Defendants to set aside the Service and to quash the writ— If that should be considered to at Home, probably it will be thought more correct to petition the Crown against the Judges, and that will be referred to the Judicial Committee of the Privy Council. That petition I think should be in the name of the Rajah of Mysore, and should state the violation of the Mysore Territories, and should incidentally state that there are Competent Courts there for the Trial of all matters of Civil nature.— It should

think

think the decision of the Privy Council
will be a more satisfactory mode of
disposing of the Claim, than by any
declaratory act of the Legislative
Council, and I have not the slightest
doubt that the decision of the Court
of Privy Council would negative
all idea of any power in a British
Court to issue Writs into a foreign
Territory.—

Calcutta
6th July 1840

Signed/ J. C. M. Turton
Act. Advocate Genl.

A true Copy
Signed/ Richard Sutherland
Major Military Secretary.